

NTSB Order No. EA-3967

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 13th day of August, 1993

Docket SE-11259

## 6117

violation of 14 C.F.R. 91.75(a), 91.87(h), and 91.9.<sup>2</sup>

On appeal, respondent argues that the law judge improperly admitted and considered the contents of a cassette tape re-recording (Exhibit A-2) and verbatim transcript (Exhibit A-3) of air traffic control (ATC) communications around the time of the incident, because approximately fourteen minutes of communications, including the taxi instruction which respondent is alleged to have violated, are missing from the re-recording.

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<sup>2</sup> Section 91.75(a) [now recodified as § 91.123(a)] provided, in pertinent part:

**§ 91.75 Compliance with ATC clearances and instructions.**

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. \* \* \* If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

Section 91.87(h) [now recodified as § 91.129(h)] provided:

**§ 91.87 Operation at airports with operating control towers.**

(h) **Clearances required.** No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

Section 91.9 [now recodified as § 91.13(a)] provided:

**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Respondent maintains that the tape was deliberately erased by an FAA employee, and that its admission prejudicially "tainted" this proceeding. He also contends that the law judge improperly permitted the ground controller who gave the disputed instruction to testify as to its substance, suggesting that the law judge should instead have made an adverse inference that the instruction was unfavorable to the FAA's position in this case. Respondent disputes the law judge's credibility finding in favor of the ground controller's testimony, and asserts that his findings of violation were not supported by a preponderance of the evidence.

The Administrator has filed a reply brief arguing that the law judge did not err in admitting the tape and transcript, and that a preponderance of the evidence supports the law judge's findings, even if the offending portion of the tape is excluded.<sup>3</sup>

As discussed below, we deny respondent's appeal and affirm the initial decision in its entirety.<sup>4</sup>

This incident occurred on September 13, 1989, at Teterboro Airport, in Teterboro, New Jersey, while respondent was taxiing his Cessna Citation along Taxiway Echo which runs parallel to

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<sup>3</sup> The Administrator's position throughout this proceeding has been that the incompleteness of the re-recording was due to tape or equipment malfunction. See Administrator's Response to Motion to Suppress, dated April 20, 1991; and discovery responses 5, 25, 26, and 27, dated July 19, 1991 (attached to respondent's "Motion in Liminae [sic]", dated August 21, 1991).

<sup>4</sup> Respondent has filed a motion seeking acceptance of an additional brief. However, he has advanced no good cause, and we discern none, for this additional filing. Accordingly, his motion is denied pursuant to 49 C.F.R. 821.48(e).

Runway 19. Although there is no tape recording of the initial taxi clearance, the ground controller (George Jones) testified that he issued respondent a clearance to taxi to "Runway 24 taxi at [sic] via [taxiways] Papa Echo, hold short Runway 24."<sup>5</sup> (Tr. 24, 32.) As respondent approached Runway 24 (where it intersects taxiway Echo), he taxied across the "hold short" line while another aircraft was landing on Runway 24. According to controller Jones, from his vantage point in the tower he could see that respondent's aircraft was entirely across the hold short line and partially on the runway itself, causing the landing aircraft to have to veer to the right to avoid respondent's aircraft. At this point, controller Jones urgently called out to respondent's aircraft (erroneously using the call sign of a different Cessna aircraft he had just spoken to): "Cessna seven two Sierra hold short of Runway two four." (Exhibit A-3 [ATC tape] and Exhibits A-2 and R-2 [transcripts of the tape].)

The ATC tape further reveals the following interchange between respondent and controller Jones just seconds after the incident:

|                  |  |
|------------------|--|
| ground control   | Citation OLE continue to taxi across Runway two four you were instructed to hold short of Runway two four . . . hold short of Runway one nine. |
| OLE [respondent] | Five zero zero Lima Echo sorry about that.   |

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<sup>5</sup> Runway 24 intersects Taxiway Echo and Runway 19. (Exhibit A-5, diagram of airport.)

Respondent's next contact with controller Jones occurred approximately four minutes later:

ground control            Ahh . . . just confirm you were . . .  
                              ahh . . . um . . . instructed to hold  
                              short of Runway two four on your initial  
                              instructions.

OLE [respondent]        Yes sir . . . five hundred Lima Echo.

In his letter to an FAA inspector, written one month after the incident, respondent again conceded that he understood he had been cleared to "taxi to Runway 24, hold short of Runway 24," but explained that he thought he was only required to hold short of the departure end of Runway 24, not the intersection of Runway 24 with Taxiway Echo. (Exhibit A-6.)

In spite of his prior statements to controller Jones and the FAA inspector conceding that he had been cleared to taxi to Runway 24 and hold short of Runway 24, at the hearing respondent denied that this was the clearance he received. Rather, although he believed at the time that he had been cleared to Runway 24, he had since become convinced that he was actually cleared to taxi to Runway 19, and that he was therefore not required to hold short of Runway 24 on his way there.<sup>6</sup> (Tr. 143, 155, 157.) He

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<sup>6</sup> Respondent's position is apparently predicated on the principle that a clearance to taxi to a takeoff runway constitutes a clearance to cross runways (other than the assigned takeoff runway) that intersect the taxi route to that assigned takeoff runway. 14 C.F.R. 91.129(h). (See also Exhibit A-7 containing a similar provision in the Airman's Information Manual.) Even if respondent had been cleared to Runway 19, however, the additional instruction to hold short of Runway 24, which respondent does not directly dispute, would still have required him to stop prior to the Runway 24 intersection.

accounted for his apology to the controller immediately after the incursion by stating that he was "self-critical by nature" and had been taught as a pilot to "take the blame" when anything goes wrong. (Tr. 143.) He further explained that his subsequent confirmation of the "hold short" clearance was motivated by a desire to "get [the controller] off my back and to get out of there," (Tr. 151) and that his inculpatory letter to the FAA inspector followed a phone call with that inspector which respondent construed to mean that if he wrote such a letter "this would all go away." (Tr. 153.)

In his initial decision the law judge stated that the ATC tape was "not a primary source" for his decision, but rather indicated that he was basing his decision on an evaluation of the testimony given at the hearing by controller Jones and respondent. (Tr. 178.) The law judge credited controller Jones's testimony, finding that he had instructed respondent to taxi to and hold short of Runway 24, as alleged in the complaint. (Tr. 179, 181.) He rejected respondent's testimony, noting that his letter to the FAA was "at great variance with his testimony," and noting also his feeling that respondent's apology to the controller after the incursion "has some bearing on what truly happened." (Tr. 178-80.) The law judge found nothing in the record to corroborate respondent's late-developed position that he was cleared to taxi to Runway 19, rather than to Runway 24. (Tr. 180.)

As the law judge's initial decision is based in large part

on a credibility determination, which is within his exclusive province, we will not disturb it on appeal unless it is arbitrary, capricious, or contrary to the overwhelming weight of the evidence,<sup>7</sup> factors not present here.<sup>8</sup> Because his determination was made after listening to all of the testimony, including that offered by respondent's expert pertaining to the 14 minute gap in the ATC tape and its potential causes, it embodies an implicit conclusion that the gap did not contain evidence which would have exculpated respondent. In other words, contrary to respondent's position, the omission in the tape -- regardless of its cause -- did not "taint" the other portions of the tape (the accuracy of which respondent does not dispute) or the remainder of the Administrator's case. In this connection, we note that even if the omission was not the result of equipment malfunction but, rather, was caused by a deliberate act, as respondent's expert opined, it does not necessarily follow (as respondent seems to assume) that the material was deleted in an

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<sup>7</sup> Administrator v. Smith, 5 NTSB 1563 (1986).

<sup>8</sup> In an attempt to discredit controller Jones's testimony, respondent notes that Jones several times used incorrect call signs in his transmissions to respondent's and other aircraft, and suggests that he could have made a similar error in issuing the original taxi clearance to respondent. However, all of the cited errors occurred after respondent's runway incursion, and in almost every case the error was corrected in the same sentence. Respondent also makes too much, in our view, of 1) controller Jones's failure to immediately focus in his testimony on the fact that the taxi clearance was missing from the ATC re-recording; 2) Jones's momentary error in pointing to Runway 19 rather than Runway 24 when asked which runway respondent was cleared to take off from; and 3) the fact that Jones re-wrote his statement (Exhibit A-1) the day after the incident to correct errors in spelling and presentation. (Tr. 11-13.)

attempt to improve the Administrator's position in this case.

In our view, the law judge was not required to draw an adverse inference against the Administrator simply because a portion of the tape was missing. Respondent's reliance on the District Court Judge's (unreported) oral decision and order in Stewart Wrightson (Aviation) Limited v. United States, No. A86-032 (April 23, 1987), a tort action in which the District Court Judge made such an adverse inference, is misplaced, as we are not bound by such an order. Moreover, the judge in that case found that the critical missing portion of the ATC tape was deliberately removed to conceal information which would have been adverse to the FAA's position in that case, a finding which is not supported by the record in this case.

Thus, it was not improper for the law judge to admit the ATC tape and transcript into evidence "for whatever materiality and relevance . . . they possess" (Tr. 161), or for him to accept other evidence (e.g. the testimony and written statement of controller Jones,<sup>9</sup> and respondent's letter to the FAA inspector) which was offered to establish the substance of the missing clearance. Under the Administrative Procedures Act, any oral or

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<sup>9</sup> We reject respondent's challenge to the admissibility of controller Jones's written statement under Rule 612 of the Federal Rules of Evidence, as those rules do not apply to Board proceedings. See Administrator v. Henry, 5 NTSB 858, 860, note 8 (1985). In any event, respondent appears to have misconstrued the scope of that rule. We do not read that rule's requirement that an opposing party be allowed to inspect and introduce into evidence any writing used to refresh a witness's memory, as posing any barrier to the Administrator's use of controller Jones's statement in this case.

documentary evidence which is not "irrelevant, immaterial or unduly repetitious evidence" is admissible in evidence. 5 U.S.C. § 556(d). Sorenson v. NTSB, 684 F.2d 683, 686 (10th Cir. 1982).

In sum, the preponderance of the evidence in this case clearly supports the law judge's finding that respondent failed to comply with controller Jones's instruction to hold short of Runway 24, contrary to 14 C.F.R. §§ 91.75(a), 91.87(h), and 91.9.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.<sup>10</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup> For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).